

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

**RECEIVED****MAR 11 1994**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In re Application of	)	CC Docket No. 94-11
	)	
<b>TELEPHONE AND DATA SYSTEMS,</b>	)	File No. 10209-CL-P-715-B-88
<b>INC.</b>	)	
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on	)	
Frequency Block B, in Market 715,	)	
Wisconsin 8 (Vernon), Rural Service Area	)	

**COMMON CARRIER BUREAU'S COMMENTS IN OPPOSITION TO  
 PETITION FOR STAY OF PROCEEDING**

To: The Commission

On March 11, 1994, Telephone and Data Systems, Inc. (TDS) and United States Cellular Corporation (USCC) (referred to collectively as TDS) filed a petition to stay the above-captioned proceeding pending action by the U.S. Court of Appeals on their appeal of the Commission's decision in La Star Cellular Telephone Company, 6 FCC Rcd 6860, aff'd, 7 FCC Rcd 3762 (1992), appeal pending sub nom. Telephone and Data Systems, Inc. v. FCC, Case Nos. 92-1291, 92-1294 (D.C. Cir.). For the reasons stated herein, the Common Carrier Bureau (Bureau) opposes the TDS petition and requests that it be denied.

1. On February 1, 1994, in Telephone and Data Systems, Inc., FCC 94-29, (released Feb. 1, 1994) (HDO), the Commission designated the application of TDS for a cellular authorization in the Wisconsin 8 Rural Service Area for hearing to determine whether USCC, a TDS

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subsidiary, misrepresented facts, lacked candor, or attempted to mislead the Commission in the La Star proceeding.<sup>1</sup> As matter of background, La Star Cellular Telephone Company (La Star) was an applicant to provide cellular service in St. Tammany Parish in the New Orleans Metropolitan Statistical Area (MSA). La Star's application was designated for hearing along with the mutually exclusive application of New Orleans CGSA, Inc. (NOCGSA). In addition to the comparative issues, the Commission also designated a threshold issue to determine whether La Star was controlled by an eligible party.<sup>2</sup> The presiding Administrative Law Judge determined after a full evidentiary hearing that La Star was not controlled by SJI, Inc. (SJI), the eligible party. The Commission affirmed this decision. On July 10, 1992, TDS appealed this decision to the U.S. Court of Appeals.

2. TDS requests that the Commission stay the designated proceeding until the court has rendered its decision in the La Star case. TDS's petition must be rejected for several reasons. First, TDS's motion must be denied because TDS has utterly failed to demonstrate the need for

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<sup>1</sup> Character issues were raised against USCC during the pendency of the La Star proceeding. The presiding Administrative Law Judge declined to address the issues. The Commission, in its Order affirming the ALJ's decision, stated that it did not need to reach the character allegations, but that:

[q]uestions regarding the conduct of . . . USCC in this case may be revisited in light of the relevant findings and conclusions here in future proceedings where the other interests of these parties have decisional significance.

7 FCC Rcd at 3767, n.3 (Footnote Three). The Commission determined upon a review of the La Star record that a substantial and material question of fact does exist as to USCC's character and designated appropriate issues in the captioned proceeding.

<sup>2</sup> Section 22.902(b) of the Commission's Rules requires that an application for Cellular Block B be controlled by a entity with a wireline presence in the market. SJI, Inc., which owned 51 percent of La Star, had a wireline presence in the New Orleans MSA. TDS, which owned 49 percent of La Star, did not.

a stay. The Commission will stay an action only in those cases where the movant has convincingly demonstrated that all four elements set forth in Virginia Petroleum Jobbers Association v. FPC, 295 F.2d 921 (D.C. Cir. 1958) have been met. The elements TDS is required to establish are that: (1) it would be irreparably harmed if its motion is not granted; (2) it is likely to prevail on the merits of its appeal; (3) a stay would cause little, if any, harm to other interested parties; and (4) a stay would serve the public interest. TDS has clearly not met this burden.

3. TDS has failed to tender any evidence, let alone prove, how proceeding prior to a ruling from the court will result in irreparable harm. TDS only asserts in passing that the HDO has caused it harm without elaboration and has not demonstrated how a stay would alleviate that asserted harm. The courts have ruled that mere economic harm is insufficient to meet the burden of establishing irreparable harm. See Virginia Petroleum, supra; Washington Metropolitan Area Transit Com'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). We note that because any decision by the court will have no effect on the need for a character hearing (see discussion below), any delay of proceeding would harm TDS, the other interested parties and the public by allowing a question to remain with regard to TDS's character and preventing the expeditious grant of permanent service in the Wisconsin 8 RSA.

4. The TDS petition should also be denied because it is unnecessary to stay the proceeding. Whatever decision the court may render in the La Star proceeding is irrelevant to the issues in the instant proceeding. The issues presented in the HDO to be heard in the captioned proceeding are not before the court. The court is considering TDS's appeal of the Commission's decision that the eligible party was not in control of La Star. In contrast, the issue

to mislead the Commission in the La Star proceeding.<sup>3</sup> The question of candor is separate from the issue of control. Assuming arguendo that the Commission is reversed on the control issue,<sup>4</sup> the need for a character hearing does not dissipate. Upon review of the La Star record, the Commission found there to be a substantial and material question as to USCC's character in the proceeding. The Commission, in the HDO, thoroughly outlined an example of where it believes a question exists. That example dealt with apparent contradictions between the written and oral testimonies of one USCC witness.<sup>5</sup> Irrespective of what the court may rule regarding control, the apparent contradictions in the La Star record remain and must be resolved in the captioned proceeding.

5. TDS relies heavily on language in the HDO which states that the factual background relied upon is that USCC controlled La Star. While it is true that a decision from the court could potentially change the background upon which the evidence is to be weighed, as discussed above, no decision from the court will change the need for a hearing. The court most certainly will have rendered its decision by October 18, 1994.<sup>6</sup> Therefore, if any decision by the court changes the background upon which the evidence is to be weighed, TDS will be able to introduce that

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<sup>3</sup> TDS did not seek review or reconsideration of Footnote Three of the Commission's La Star decision. Instead, TDS sought review of the wireline control issue only.

<sup>4</sup> By making this argument, the Bureau in no way is agreeing with TDS that TDS is likely to prevail in its argument with the court.

<sup>5</sup> In its motion for stay, TDS attempts to explain the apparent contradictory testimony. This discussion by TDS should be disregarded as it has nothing to do with a motion for stay, but instead is the type of evidence that TDS should introduce in the captioned proceeding.

<sup>6</sup> In the pre-hearing conference on March 15, 1994, the presiding administrative law judge set the procedural dates. October 18, 1994, was the date set for the first day of hearing. See Order, FCC 94M-169 (released March 17, 1994).

evidence in the hearing upon the proper background and the presiding administrative law judge will be able to consider it appropriately. Accordingly, no stay is necessary. In the extremely unlikely event that no decision has been rendered by the court by October 18, 1994, the Commission can revisit TDS's request at that time.

6. The arguments raised by TDS regarding the background upon which the Commission relied in rendering its decision would have been more properly raised in an appeal of the HDO. This is not the proper time for filing such an appeal. See 47 C.F.R. § 1.106.

7. Moreover, despite TDS's arguments, the assessment by the Commission that "USCC had every incentive to suggest that USCC was not in control"<sup>7</sup> will remain valid regardless of what the court ultimately decides as to the control issue. The control issue was a threshold issue; during the La Star hearing, if La Star did not prevail on that issue, the presiding ALJ need not go any further. Accordingly, the incentive for the USCC witnesses to misrepresent facts exists whether or not SJI controlled La Star. TDS is apparently under the false assumption that its witnesses would only have the incentive to mislead the Commission if its case was not a winning case. Even parties who ultimately should prevail on the facts of the case possess the incentive and capability to engage in misrepresentation because until the judge rules they do not know the final outcome of the proceeding.

8. Finally, the Bureau believes that TDS is estopped from claiming that the Commission cannot act on the character questions until the court has rendered a decision because TDS has itself previously requested that the Commission adjudicate the character issues during the pendency of the La Star appeal. On February 1, 1993, more than six months after TDS filed its

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<sup>7</sup> HDO at ¶ 33.

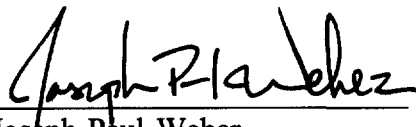
appeal with the court, TDS requested that the Commission resolve the character issues raised in footnote 3 in its Petition to Delete or Nullify the Effect of Footnote Three. In the HDO, the Commission considered the merits of TDS's request to resolve the character issues and determined that, based upon the La Star record, it could not do so, and therefore denied TDS's Petition to Delete or Nullify the Effect of Footnote Three.<sup>8</sup> Because TDS requested that the Commission take action regarding Footnote Three while its appeal was pending at the court, TDS cannot now claim that the proceeding should be stayed until the court renders a decision because TDS is not satisfied with the action taken by the Commission.

Therefore, for the foregoing reasons, the Bureau objects to the motion to stay filed by TDS and requests that it be denied.

Respectfully submitted,

A. Richard Metzger, Jr.  
Acting Chief, Common Carrier Bureau

March 17, 1994

By:   
Joseph Paul Weber  
Trial Attorney

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<sup>8</sup> See HDO at ¶¶ 36, 43.

**CERTIFICATE OF SERVICE**

I, Elizabeth Williams, do hereby certify that on March 17, 1994, copies of the foregoing Comments in Opposition to Petition for Stay of Proceeding were served by first-class mail, U.S. Government frank, except as otherwise noted, on the following parties:

**DELIVERED BY HAND**

Honorable Joseph Gonzalez  
Federal Communications Commission  
2000 L Street, N.W.  
Washington, D.C. 20554

Alan Y. Naftalin, Esq.  
Herbert D. Miller, Jr., Esq.  
Koteen & Naftalin  
1150 Connecticut Avenue, N.W.  
Suite 1000  
Washington, D.C. 20036

R. Clark Wadlow, Esq.  
Mark D. Schneider, Esq.  
Sidley & Austin  
1722 Eye Street, N.W.  
Washington, D.C. 20006

Kenneth E. Hardman, Esq.  
Moir & Hardman  
2000 L Street, N.W.  
Suite 512  
Washington, D.C. 20036

L. Andrew Tollin, Esq.  
Luisa L. Lancetti, Esq.  
Wilkinson, Barker, Knauer & Quinn  
1735 New York Avenue, N.W.  
Washington, D.C. 20006-5289

Michael B. Barr, Esq.  
Hunton & Williams  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

**DELIVERED BY HAND**

John I. Riffer, Esq.  
Associate General Counsel  
Federal Communications Commission  
1919 M Street, N.W. Rm. 610  
Washington, D.C. 20554

  
Elizabeth Williams